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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 202-203

MARYLAND CASUALTY COMPANY, a Corp., *Petitioner*,

v.

EARL D. ALFORD, Administrator of Estate of Frederick W. Weidman, Deceased, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Summary Statement of the Matter Involved	2
Reasons Relied on for the Allowance of the Writ	12
Brief in Support of Petition for Writ of Certiorari	15
I. Opinions of the Court Below	15
II. Jurisdiction	16
III. Statement of the Case	18
IV. Specifications of Errors	18
V. Argument	19
Summary of the Argument	19
Point A	19
Point B	28
Conclusion	30

CASES CITED.

Blunt v. Chicago, R. I. & P. R. Co., et al., 70 Okl. 149, 173 Pac. 656	29
Board of County Com'rs of Creek County v. Vaughn, et al., 51 Okla. 609, 152 Pac. 115	12, 24
Chandler v. Rutherford, C. C. A. 8th Circuit, 101 Fed. 774	12, 22
Chandler v. Rutherford, 51 S. W. 981	22
Clement v. Dunn, 114 Cal. App. 60, 299 Pac. 545	13, 25
Dysart v. Lurty, (1895) 3 Okla. 601, 41 Pac. 724	12, 20
Filarski v. Covey, 194 Cal. 504, 242 Pac. 874	13, 25
Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095	17
Globe Indemnity Company v. Bruce, et al., 81 Fed. (2) 143	25

Page

Gray v. DeBratton, 184 So. 390 13
Gray v. DeBratton, 192 La. 638, 188 So. 722 ..... 13, 26
Hughes et al. v. Board of Com'r of Oklahoma County, 50 Okla. 410, 150 Pac. 1029 ..... 12, 24
Humphrey v. Ownby et al., 104 S. W. (2d) 398 ..... 13, 26
In the matter of 620 Church Street Building Corporation et al., Petitioners, 57 Sup. Ct. 88, 299 U. S. 24, 81 L. Ed. 16 ..... 17, 29
Inman v. Sherrill et al., 29 Okla. 100, 116 Pac. 426 ..... 12, 21
Jordan v. Neer, 34 Okla. 400, 125 Pac. 1117 ..... 12, 21
Lowe v. City of Guthrie, 4 Okla. 287, 44 Pac. 199 ..... 12, 24
McCorcle v. Morton, 171 Okla. 632, 44 Pac. (2) 9 23
McLain v. Arnold, 73 Okla. 52, 174 Pac. 563 ..... 12, 21
L. Vea v. Day, 6 La. App. 382 ..... 13, 25
McVey, et al., v. Gross, D. C. N. D. Texas, Dallas Division, 11 F. (2) 379 26
Meek v. Tilghman, 55 Okla. 221, 154 Pac. 1190 23
Missouri, O. & G. Ry. Co., et al., v. Lee, 73 Okl. 165, 175 Pac. 367 28
Nelson, Lee E., personally and as guardian ad litem v. Jeff Bartell et al., — Wash. —, — Pac. —, not yet officially reported 13, 26
Pitman v. State, 59 Okla. 270, 158 Pac. 1137 ..... 12, 24
SW Surety Ins. Co. v. Neal, 81 Okla. 194, 197 Pac. 439 ..... 12, 25
Taylor v. Morgan, 43 Okla. 142, 141 Pac. 679 ..... 12, 22
Usrey et al. v. Yarnell, 181 Ark. 804, 27 S. W. (2) 988 ..... 13, 25

STATUTES CITED.

Oklahoma Statutes, 1931, Sec. 4732 ..... 5, 19
Oklahoma Statutes, 1931, Sec. 4741 20

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Maryland Casualty Company prays that a writ of Certiorari issue to review the final judgments of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above entitled cause on May 22, 1940.

Opinions Below.

The opinion in the United States District Court for the Northern District of Oklahoma is found at Page 54 of the Record and is reported in 27 Fed. Supp. 176. The opinion of the Circuit Court of Appeals, not yet published, is printed in the Record at pages 125 to 130, inclusive.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on April 20, 1940. Petition for rehearing was denied on May 22, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Such jurisdiction is more particularly defined in the brief in support of this petition.

Questions Presented.

1. Whether the surety on the official bond of a public officer, conditioned for the faithful performance of his duties, is liable for the negligence of such officer who, while transporting himself to his headquarters and home from a place of duty, had a collision with decedent's car.

2. Whether the trial court erred in instructing the jury in the Mamie M. Weidman case, that in fixing the amount of damages, the jury could take into consideration the mother's moral training, teaching and support of the things that she would have contributed towards minor children during her life expectancy.

Note: In connection with this question, there are the additional questions (a) as to whether the Circuit Court of Appeals erred in holding that the foregoing instruction was not open to review under the stipulation of consolidation; and (b) as to whether the instruction was properly challenged.

Summary Statement of the Matter Involved.

This is an action brought originally in the Superior Court of Creek County, Oklahoma, (Transcript page 8 and others) by respondent Earl D. Alford, Administrator of the estate of Frederick W. Weidman, deceased, against Dave McConnell, Superintendent of the Bureau of Criminal Identification of the State of Oklahoma, and the petitioner, the

Maryland Casualty Company, a corporation, surety on the official bond of Dave McConnell, and was removed to the United States District Court for the Northern District of Oklahoma by the Maryland Casualty Company. (Transcript p. 27)

The action was one to recover damages for wrongful death brought by intestate's administrator and also for damages to deceased's automobile, and for funeral expenses. The action was brought for the benefit of the estate of Frederick W. Weidman, and his two daughters, both minors at the institution of the action.

The case was consolidated for trial with a similar case filed at the same time for the wrongful death of Mamie M. Weidman, mother of the two minors and wife of the decedent who lost her life in the same accident.

After a trial before a jury, verdicts were returned and judgments rendered against Dave McConnell and his bonding company, the petitioner herein, for the sum of $5,584.52 in the Frederick W. Weidman case, and $5,378.31 in the Mamie M. Weidman case.

Separate appeals to the United States Circuit Court of Appeals for the Tenth Circuit were taken from adverse judgments by the Maryland Casualty Company, and for purposes of determining the appeals conveniently and with less expense the cases were consolidated on appeal (Tr. page 3).

The principal questions involved on said appeal were whether or not the surety on the official bond of Dave McConnell, a public officer, was liable for negligence of McConnell, who while returning from quelling a labor disturbance near Picher, Okahoma, to his headquqarters and home in Oklahoma City, Okla., had a collision with decedent's car, and also whether or not the trial court erred in instructing the jury in the Mamie M. Weidman case that in fixing the amount of damages, the jury could take into consideration the mother's moral training, teaching and

support of the things that she would have contributed towards these minor children during her life expectancy.

The questions were decided adversely by the United States Circuit Court of Appeals for the Tenth Circuit and materially affect the determination of said appeal.

Plaintiff's amended petition (Tr. pp. 28-42) sets out three causes of action and after the formal portions as to identity of parties further states that McConnell was the Superintendent of the Bureau of Criminal Identification of the State of Oklahoma, and that on and prior to May 29th, 1935, while he was officially engaged in the performance of his duties as such superintendent he unlawfully, carelessly, and negligently operated his automobile on U. S. Highway 66 near Bristow, Oklahoma, and collided with an automobile driven by the deceased, causing the death of the deceased.

The petition further alleges that McConnell while engaged in and performing his official duties returning from Ottawa County, Oklahoma, where he had been engaged in the discharge of his official duties in connection with an alleged miners' strike condition in Ottawa County, to Oklahoma City, with and in charge of a squad of men, officers, and other persons driving in two automobiles, with McConnell driving the front car loaded with men and equipment of his official office, together with several officers who were then employees of the state government, drove at a high, reckless, and dangerous rates of speed, 70 or 80 miles an hour, while under the influence of intoxicating liquor in violation of the laws of Oklahoma. That he drove in a zigzag manner while approaching Weidman's car, crossing and recrossing the center line of the highway so as to strike Weidman's car and knocking it back 105 feet and causing it to be turned over. Further that Weidman was thrown around in his car and sustained injuries from which he died.

The petition then set forth the Oklahoma Statutes prohibiting driving while drunk, OS 1931, Sec. 10324, and

Rule 1 of the Rules of the Road, OS, 1931, Sec. 10321, providing that vehicles meeting each other shall keep to the right center of the road.

The petition then alleged that the negligent conduct of McConnell was the direct and proximate cause of the injuries to Weidman which resulted in his death.

The petition then set forth Weidman's earning capacity, his age and life expectancy and that he left surviving him two minor children, Margaret D. Weidman, 10 years, and May M. Weidman, 16 years.

Plaintiff then alleged that under the provisions and in compliance with section 4732, O. S. 1931, it is provided in reference to the bond of the Superintendent of the Bureau of Criminal Identification and Investigation for the state of Oklahoma that:

> "The Superintendent shall be appointed by the Adjutant General, with the approval of the Governor, to serve at the pleasure of the Adjutant General, and shall receive a salary of $3,600 per annum, and shall execute a bond to the State of Oklahoma in the sum of Ten Thousand Dollars conditioned for the faithful performance of his duties."

and further, that pursuant to the statute the defendant, Dave McConnell, was required to and did execute a bond or undertaking in the sum of Ten Thousand Dollars as principal, and the defendant, Maryland Casualty Company, became surety upon the official bond of Dave McConnell. A copy of the bond appears at page 91 of the transcript of the record.

Plaintiff then alleged that the terms and conditions of the bond were breached and broken in that Dave McConnell failed in the "faithful performance of his duties" in and to his office. The petition further alleged that as such superintendent Dave McConnell was solemnly bound under his bond and oath to strictly observe, obey and comply with all the constitutional and statutory laws of the State of

Oklahoma, and that he failed, refused and neglected to perform and discharge his statutory and mandatory duty toward the State of Oklahoma, and its citizens, and plaintiff's intestate in particular. Thereby the terms and conditions of the bond became broken, and Dave McConnell was therefore liable as principle, and the Maryland Casualty Company was liable as surety. Plaintiff prayed judgment against McConnell for $25,000 and against the Maryland Casualty Company for $10,000.

Plaintiff's second cause of action was for conscious pain and suffering and was dismissed.

Plaintiff's third cause of action was for damages for loss of deceased's automobile and for hospital and medical bills and for funeral expenses.

The defendant, Maryland Casualty Company, answered pleading a general denial (Tr. pp. 44-45), and contributory negligence. Defendant denied that Dave McConnell was the agent, servant and on business for the State of Oklahoma, and pleaded that the cause of action against the defendant McConnell, and the Maryland Casualty Company, were separable and not subject to being joined in this action, and that there was no liability on the contractual obligation of the Maryland Casualty Company. This answer was amended (Tr. p. 45) before trial, the defendant Maryland Casualty Company pleading in the alternative that the suit was upon an official bond, and if there is any liability at all, there is only one penalty, and that is limited to $10,000 and pleaded that the defendant Maryland Casualty Company had been sued on this same bond, in two other actions growing out of this same accident, all pending in the same court to recover the full penalty of $10,000 in each suit, and further prayed that if there be a recovery that the court marshal and apportion the recovery on the bond between the three suits as, under the law of equity, might be deemed proper, but to protect the defendant, Maryland Casualty Company, against all loss of but one penalty in the amount of $10,000.

Plaintiff denied all the new matters in the answer in his reply duly filed (Tr. pp. 46 and 47).

The principal controversy in this appeal arises over whether or not the official bond of the defendant Maryland Casualty Company extended to the activities of Dave McConnell as Superintendent of the Bureau of Criminal Identification on his return from a scene of duty in suppressing a strike in Miami, Oklahoma, to his home and headquarters in Oklahoma City, Oklahoma, at the state capitol.

What McConnell was doing at the time of the accident is embodied in the following stipulation (Tr. p. 90):

I.

"That some few days prior to the 29th day of May, 1935, the defendant Dave McConnell had been ordered to duty in his official capacity to the strike area in the Miami, Oklahoma, district, and that he had gone to Miami and performed this duty up until the morning of May 29th, 1935."

II.

"That on the morning of May 29th, 1935, martial law was declared and the duties of Dave McConnell, in his official capacity had been superseded and taken over by the military authorities."

III.

"That the headquarters of Dave McConnell in his office as Superintendent of the Bureau of Criminal Identification and Investigation of the State of Oklahoma was located at the State Capitol in Oklahoma City, Oklahoma."

IV.

"That the defendant Dave McConnell at said time lived, resided and had his home in Oklahoma City, Oklahoma."

V.

"That at the time this accident occurred, the defendant Dave McConnell was returning from Miami, Oklahoma, to Oklahoma City.

"It is agreed the above facts are true and this stipulation may be received in evidence.

After the foregoing stipulation was read to the court and jury the following occurred (Tr. pp. 100-101).

"The Court: 'I don't remember that the stipulation includes that the defendant, Dave McConnell, was the Superintendent of the Bureau of Investigation of the State of Oklahoma. Is that agreed?'

"Mr. Green: 'Yes, Your Honor, the Maryland Casualty Company will stipulate to that.'

"The Court: 'All right'."

Also during the trial the following verbal stipulation was entered into by Counsel (Tr. pp. 112-114):

" Mr. Goldesberry: It may be stipulated and agreed that the guns and ammunition and the other *paraphernalia* that has been testified to by the witnesses found in the car driven by Mr. McConnell on this occasion of this collision, was State property and belonged in the office of the Bureau of Investigation.

"Mr. Green: I will stipulate to whatever property and paraphernalia in that car belonged to the State.

"Mr. Goldesberry: All right, that way. Whatever there was in there in the way of ammunition and guns, matters of that sort, belonged to the State and was in the possession of the State Bureau of Investigation.

Mr. Green: I understand, Your Honor please, part of that was personal property. Part of it belonged to Mr. McConnell.

"The Court: Is there any controversy here that Mr. McConnell had been to Picher, in the mining district, to suppress lawlessness of miners on account of the strike.

"Mr. Goldesberry: No, that is in the stipulation.

"The Court: That is what I thought, and he was returning back to the State Capitol where his office was?

"Mr. Green: Returning to Oklahoma City.

"The Court: Gentlemen, you won't get any where quibbling about it all.

"Mr. Green: That is right.

"The Court: And the officers in charge of it operate from that office.

"Mr. Green: That is right.

"The Court: And when they go out on official business they return back after they finish that official business, back to their headquarters at Oklahoma City, is that correct?

"Mr. Green: Yes, sir. Before they resume work again they return to their headquarters.

"The Court: What do you mean by work?

"Mr. Green: Your Honor, please, this happened to be the day before a *holiday* and he wasn't going back to his office for two days.

"The Court: He was going back to Oklahoma City where his home was.

"Mr. Green: That is right.

"The Court: And the routine manner of his work is, when he is away from the Capitol, when he gets through with the mission he is on, he returns back where his official duties call him to the Capitol.

"Mr. Green: That is right."

The mortality tables were introduced showing life expectancy at age 57 to be 16.05 years and at 43, to be 25.01 years.

The cases of Frederick W. Weidman and Mamie Weidman were consolidated for trial, and the parties agreed upon a narrative statement of the evidence to be used in the transcript of the record on appeal to the United States Circuit Court of Appeals for the Tenth Circuit (Tr. p. 123).

It would serve no useful purpose to state the facts and repeat the evidence in this petition, and it is sufficient to state that the evidence discloses there was a serious fatal accident and that the defendant Dave McConnell collided with the car driven by Frederick W. Weidman, in which

were riding his wife Mamie Weidman, and their daughter Margaret Weidman. Frederick W. Weidman and Mamie Weidman lost their lives.

There was evidence of negligence on the part of Dave McConnell, and that consisted chiefly of the evidence of Margaret Weidman who testified that she was in her father's car, and saw the automobile that hit them before it did strike them, and that it was weaving back and forth on the road a distance that the witness could not state.

There was evidence of skid marks on the wrong side of the highway as far as the McConnell car was concerned. There was evidence of a whiskey smell about McConnell's car, but no evidence that McConnell had been drinking.

After instructions of the Court, the jury returned a verdict in the Frederick W. Weidman case for $5000.00 on the First Cause of Action for wrongful death and $584.52 on the Third Cause of Action for car damage and funeral expense. (Tr. pp. 61-62) In the Mamie M. Weidman case the jury returned a verdict for $5000.00 and an additional sum of $378.31 on the Second Cause of Action for Mamie Weidman's funeral expenses. (Tr. p. 62) Judgments were entered accordingly on the verdicts of the jury. (Tr. pp. 60-64)

Another controversy in the case grows out of the trial court's instructions (Tr. p. 73). The court instructed the jury as follows:

> "You may also in fixing the amount of damages, take into consideration the mother's moral training, teaching and support commensurate to the things that she would have contributed towards these minor children during her life expectancy. You know a mother sometimes contributes more than a pecuniary support to minor children, but the law permits moral effect upon their general character to be considered in determining the amount of damages you will award so far as the mother's death is concerned, but I believe you should confine, and you are so instructed, your award, if you find for the plaintiff, only, in so far as the minority of the two daughters is concerned."

Objection and exception was taken to these instructions (Tr. p. 79). The question as to the instructions was that these instructions were given only concerning the Mamie M. Weidman case, the mother of the two minors. The cases were consolidated under the Frederick Weidman case, No. 1946 in the United States Circuit Court of Appeals, and the Circuit Court of Appeals, in a majority opinion (Tr. pp. 125-132) held that this question in case No. 1947, the Mamie Weidman case could not be considered in the Frederick W. Weidman case.

An appeal was duly taken in each of the two cases to the United States Circuit Court of Appeals for the Tenth Circuit. As outlined briefly at the beginning of the petition these cases were consolidated under the U. S. C. A. Title 28, Section 734 (Tr. p. 3). A Motion for Consolidation, Stipulation for Consolidation and Supplement to Stipulation for Consolidation, were duly filed and an Order entered thereon, consolidating said causes (Tr. pp. 1-4). Briefs were filed, and the cases argued on appeal, and the principal questions involved were those heretofore set out, principally whether or not the petitioner, Maryland Casualty Company, surety on the official bond of a state officer was liable for acts of the principal while transporting himself from a place of duty to his headquarters and home, the contention of petitioner being that such an act was not an act done BY VIRTUE OF his office.

There was another question which is not material here, namely, that the surety was only liable for one recovery on the total penalty of the bond, and the Circuit Court of Appeals upheld the Appellant on this contention ordering remititures, which were promptly filed (Tr. pp. 133-134), reducing the total recovery in the two consolidated cases to a total sum of $10,000.00. (Tr. p. 129.)

The Circuit Court of Appeals held that the accident happened while Dave McConnell was performing an official act and that the surety was liable for the act of its principal while negligently performing an official act, and also

held that the Circuit Court of Appeals could not decide the question on the objectionable instruction because, under the stipulation it could only consider questions that were common to both cases, and that this question arose in case No. 1947 in the Circuit Court of Appeals, and the stipulations and orders for consolidation were entered consolidating the cases on appeal under case No. 1946, the Frederick W. Weidman case, and for the further reason that the objections to the instruction were not properly made.

A Petition for Rehearing was filed (Tr. p. 134), and by the Circuit Court of Appeals denied. (Tr. p. 135.)

Reasons Relied on for the Allowance of the Writ.

(A) The decision of the Circuit Court of Appeals as to the question of liability of a surety on an official bond of a public officer making the surety liable for negligent acts of the officer while traveling from a place of duty to his home and headquarters by holding the surety liable for such negligent acts, IS A DECISION OF AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY THAT IS PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The cases that are in conflict with the decision of the Circuit Court of Appeals are:

Board of County Com'rs of Creek County v. *Vaughr, et al.*, 51 Okla. 609, 152 Pac. 115.
Chandler v. *Rutherford*, C. C. A. 8th Circuit, 101 Fed. 774.
Dysart v. *Lurty*, 3 Okla. 601, 41 Pac. 724.
Hughes et al. v. *Board of Com'r of Oklahoma County*, 50 Okla. 410, 150 Pac. 1029.
Inman v. *Sherrill et al.*, 29 Okla. 100, 116 Pac. 426.
Jordan v. *Neer*, 34 Okla. 400, 125 Pac. 1117.
Lowe v. *City of Guthrie*, 4 Okla. 287, 44 Pac. 199.
McLain v. *Arnold*, 73 Okla. 52, 174 Pac. 563.
Pitman v. *State*, 59 Okla. 270, 158 Pac. 1137.
SW Surety Ins. Co. v. *Neal*, 81 Okla. 194, 197 Pac. 439.
Taylor v. *Morgan*, 43 Okla. 142, 141 Pac. 679.

(B) The decision of the Circuit Court of Appeals as to the question of travel negligently performed by a public officer from a place of duty to his home and headquarters resulting in injuries to third parties being an official act done by virtue of his office and holding the surety liable for the negligence of its principal is in conflict with the weight of authority.

The cases from the prevailing view are:

Filarski v. *Covey*, 194 Cal. 504, 242 Pac. 874.
Clement v. *Dunn*, 114 Cal. App. 60, 299 Pac. 545.
Usrey et al. v. *Yarnell*, 181 Ark. 804, 27 S. W. (2) 988.
McVea v. *Day*, 6 La. App. 382.
Humphrey v. *Ownby et al.*, 104 S. W. (2) 398.
Gray v. *DeBratton*, 184 So. 390.
Gray v. *DeBratton*, 192 La. 638, 188 So. 722.
Lee E. Nelson, personally and as guardian ad litem v. *Jeff Bartell et al.*, —— Wash. ——, —— Pac. ——, not yet officially reported.

(C) The decision of the Circuit Court of Appeals as to the question of the erroneous instruction by holding that the question could not be considered in view of the order of consolidation, and that the objections to the instruments was not timely, INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW AND PROCEDURE under rule 51 of the Federal Rules of Civil Procedure, and under the statutes providing for consolidation of cases, 3 Stat. 21, 28 U. S. C. A. Sec. 734, and under general procedure, R. S. Sect. 716, 36 Stat. 1162, 28 U. S. C. A. Sec. 377

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Tenth Circuit had in the cases numbered and entitled on its docket, No. 1946, *Maryland Casualty Company, a Corporation, Appellant,*

v. *Earl D. Alford, Administrator of the estate of Frederick W. Weidman, deceased, Appellee,* and No. 1947, *Maryland Casualty Company, a Corporation, Appellant,* v. *Earl D. Alford, Administrator of the estate of Mamie M .Weidman, Appellee,* to the end that these causes may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgments herein of the United States District Court for the Northern District of Oklahoma as affirmed by the Circuit Court of Appeals for the Tenth Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated this 2nd day of July, 1940.

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